

**FISH AND GAME COMMISSION
REQUEST FOR RE-ADOPTION OF EMERGENCY
REGULATIONS**

Emergency Action to Re-adopt Section 749.3, Title 14, CCR,
Re: Special Order Relating to Incidental Take of Longfin Smelt
(*Spirinchus thaleichthys*) During Candidacy Period

Request for Re-adoption of Emergency Regulation:

The Fish and Game Commission ("Commission") requests to re-adopt Section 749.3, Title 14, California Code of Regulations ("CCR") [Office of Administrative Law (OAL) file number 2008-0220-02EE] with minor modifications. The Findings of Emergency for this file containing the following information: Statement/Finding of Emergency; Authority and Reference Citations; Informative Digest; Fiscal Impact Statement; Standard Form 399, is hereby incorporated by reference. The objective of this regulation is to allow specified activities to continue on an interim basis, subject to the measures in the regulation designed to protect longfin smelt, while the Department of Fish and Game ("Department") focuses its efforts on further evaluating the status of longfin smelt.

Emergency Regulation in Effect to Date:

On February 7, 2008, the Commission accepted a petition to list longfin smelt as threatened or endangered under the California Endangered Species Act ("CESA"), thereby designating the longfin smelt a candidate species. On February 7, 2008, the Commission adopted an emergency regulation pursuant to Fish and Game Code ("FGC") section 2084 to provide coverage for the take of longfin smelt during its candidacy period ("2084 regulation"). The 2084 regulation was approved by OAL and became effective on February 29, 2008. Pursuant to Government Code ("GC") sections 11346.1(e) and (h) emergency regulations are effective for 180 days. OAL may approve two re-adoptions, each for a period not to exceed 90 days. On August 27, 2008, OAL approved a re-adopted 2084 regulation. In the absence of a second re-adoption, the 2084 regulation will expire on November 25, 2008.

Statement of Emergency:

Pursuant to FGC sections 2080 and 2085, take of a candidate species is prohibited, unless: (1) the take is authorized in a regulation adopted by the Commission pursuant to FGC section 2084; or (2) the Department authorizes the take through incidental take permits or other limited mechanisms issued on a project-by-project. Therefore, in the absence of a 2084 regulation, individuals engaged in otherwise lawful research and monitoring, dredging and extraction of sand or gravel resources, or water diversion that may result in take of longfin smelt would have to obtain a permit from the Department in order avoid liability

and potential criminal violations of CESA for actions or activities that result in take of the candidate species.

The issuance of individual permits authorizing incidental take is a complicated and lengthy process, and the Commission specifically finds that it is not feasible for the Department to issue incidental take permits on a project-by-project basis for the above-referenced activities that will otherwise be prohibited during the longfin smelt's candidacy period. For these reasons, re-adoption of the 2084 regulation is necessary to allow the continued export of water for agricultural, municipal and industrial use along with the other specified scientific and commercial activities. This regulation will ensure appropriate interim protections for longfin smelt within the area covered by the petition while the Department continues its 12-month review of the status of the candidate species.

Given that the emergency circumstances that necessitated the original 2084 regulation are continuing and unchanged, the Commission requests that the previous Finding of Emergency and Supplement to Statement of Emergency Action be used to supplement this justification.

Compliance with Re-adoption Criteria

(1) Same or Substantially Equivalent:

Pursuant to GC section 11346.1(h), the text of a re-adopted regulation must be the "same or substantially equivalent" to the text of the original emergency regulation. The proposed language for the re-adopted 2084 emergency regulation is substantially equivalent to the language of the original 2084 emergency regulation. The text of both regulations provides coverage for the take of longfin smelt subject to certain conditions for the following activities: research and monitoring, dredging and extraction of sand or gravel resources, local water diversions and operation of the State Water Project and Central Valley Project export facilities. Modifications have been made to the text of the original 2084 regulation to provide additional clarification, technical accuracy, improved organization, or to adjust certain take-risk assessment or abatement criteria to reflect the different time-period this regulation will be covering, and thus remain protective of the different life stages of the longfin smelt that will occur during this time period.

No doubt, during the period covered by this regulation, other factors are impacting the population of longfin smelt. These include, but are not limited to, invasive species, water quality and pollution and other factors. The Commission could have considered a 2084 regulation that addressed take that is likely to occur from other activities that are stressors for which there are identifiable responsible parties. However, because of the need to re-adopt a regulation that is "substantially similar" to the existing regulation, the Commission is not addressing such other stressors through a 2084 regulation. The Commission

and the Department are looking at other means to address such activities, and other stressors for which there may not be identifiable responsible parties (e.g., invasive species and water quality), that could be adversely impacting longfin smelt.

Specifically, the following changes have been made to the text of section 749.3, Title 14, CCR¹:

(1) Research and Monitoring:

The language in sections (a)(1)(B)1 and (a)(1)(B)2 describing project proposals has been modified to require that the proposals are "approved by" the Regional Manager as opposed to "provided to" the Regional Manager. This language was added to clarify that the Department, not the project proponent, decides if the efforts described in the project proposals to minimize adverse effects to longfin smelt are sufficiently protective.

(2) Dredging and Extraction of Sand or Gravel Resources:

The following exception was added to section (a)(2): "any dredging activity in the Sacramento-San Joaquin Delta east of river kilometer 90 (Sherman Island), is prohibited during the effective period of this regulation." This language was added because longfin smelt are known to occur after October 1 (during the period of the proposed regulation) in the area described, and therefore preventing disruptive activities from proceeding in the area is beneficial to longfin smelt.

The following criterion has been added to the information that must be reported when take of longfin smelt occurs: "length of any longfin smelt." This requirement was inadvertently omitted in the original 2084 regulation, and was added because it is critical information used by the Department to decipher the age of longfin smelt, and thus make important conclusions about the range and life-cycle of the species.

(3) Local Water Diversions:

Section (a)(3)(A) has been modified to require only diversions of 250 cfs or more to request take authorization. The addition of this 250 cfs threshold ties the requirements of the regulation to an existing distinction in the FGC about diversions above and below 250 cfs (see FGC sections 5980 et seq. and 6020 et seq.) The Department believes that this consistency with existing provisions of law will minimize confusion.

¹ Revisions to the original text made to correct spelling errors, update phone numbers or realize other minor technical edits will not be discussed.

Section (a)(3)(B) has been modified to clarify that diversions must only be screened if it is determined by the Department that there is potential for take of longfin smelt. This clarification was made to require screening only where necessary to protect longfin smelt.

As in section (2), the following criterion has been added to the information that must be reported when take of longfin smelt occurs: "length of any longfin smelt."

(4) State Water Project and Federal Central Valley Project Export Facilities:

The content of this section in the proposed 2084 regulation is substantially the same as the content in the original 2084 regulation. However, edits were made to the protective measures to reflect the fact the longfin smelt encounter different conditions and obstacles in fall and early winter, and different longfin smelt life stages may be present in the system during the effective period of the proposed regulation.

Language was added to the introductory section of (a)(4) to update the status of the *Kempthorne*² requirements. The language previously informed that the court directed the Fish and Wildlife Service ("FWS") to issue its new biological opinion (BO) by September 15, 2008, however that date has since been extended to December 15.

The proposed 2084 regulation modifies certain conditions because all longfin smelt life stages are found in the system in fall and winter, and different surveying methods occur during these times. For example, the original and proposed 2084 regulation both require monitoring for the presence of adult and larval smelt, but the proposed regulation modifies section (a)(4)(A) to include monitoring for juveniles and includes additional monitoring locations and surveying methods while removing those that are no longer relevant. In addition, both the original and proposed 2084 regulations include procedures for the Department of Water Resources (DWR) and Bureau of Reclamation (Reclamation) to follow when collecting adult and larval longfin smelt, but the proposed 2084 regulation includes more clearly defined procedures, removes the need to count and preserve larval longfin smelt, and includes juvenile longfin smelt.

The original and proposed 2084 regulation both require measures to protect larval and juvenile longfin smelt, but the proposed 2084 regulation modifies section (a)(4)(B) to coincide the triggering event with the survey that occurs

² In *Natural Resources Defense Council v. Kempthorne*, the United States Eastern District Court issued an Interim Remedial Order Following Summary Judgment and Evidentiary Hearing which required specific limitations on the joint operations of the State Water Project (SWP) and the Federal Central Valley Project (CVP) in order to prevent the extinction of delta smelt until a new delta smelt biological opinion is issued by the United States Fish and Wildlife Service.

during this time period (Smelt Larva Survey). Additionally, suspension actions and resuming actions have been modified to both remain protective and better identify late fall and winter flow conditions when longfin smelt are not at risk and export restrictions can be eased. The proposed 2084 regulation adds section (a)(4)(C) to provide specific measures to protect adult longfin smelt. The format of section (a)(4)(C) follows the format found in the original 2084 regulation for the protection of larval longfin smelt: flow requirements based on identified triggers that can be suspended or resumed based on the conditions in the system. Finally, the proposed 2084 regulation adds section (a)(4)(D) to increase transparency in and add flexibility based on credible science to the decision-making process. The process outlined in (a)(4)(D) is followed by the Department when determining flow requirements. As a part of that process, it is anticipated that the Department, as well as the Smelt Work Group, FWS, DWR and Reclamation, will work with the Longfin Smelt Risk Assessment Matrix (LSRAM) and use all available tools that are appropriate under the circumstances, including the Particle Tracking Modeling and the Particle Entrainment Index, to determine appropriate biological flow objectives.

(2) Substantial Progress:

GC section 11346.1(h) specifies that the emergency rulemaking agency must demonstrate that it is making "substantial progress and has proceeded with due diligence" to comply with the standard rulemaking provisions. The Commission has complied with this requirement by proceeding with due diligence to determine whether or not listing the longfin smelt as a threatened or endangered species is warranted. The Commission's forthcoming final decision regarding the status of the longfin smelt obviates the need for permanent 2084 measures.

A 2084 regulation is an appropriate mechanism to authorize take for "candidate" species. Pursuant to FGC sections 2080 and 2085, take of a candidate species is prohibited, unless: (1) the take is authorized in a regulation adopted by the Commission pursuant to FGC section 2084 or (2) the Department authorizes the take through incidental take permits or other limited mechanisms issued on a project-by-project basis. Therefore a 2084 regulation is an appropriate mechanism to authorize take of a candidate species. However, a species is only a "candidate" until the Commission decides whether listing the species as threatened or endangered "is warranted" or "is not warranted" (FGC section 2075.5). This determination immediately follows the conclusion of the 12-month review of the species' status by the Department (FGC section 2074.6). Therefore, after the Commission makes the determination that listing the species is or is not warranted, a 2084 regulation is no longer necessary or appropriate³ because the species is no longer a candidate for listing. At that point, the species is either protected under CESA by virtue of its listed status or is no

³ FGC section 2084 states: "The Commission may authorize, subject to terms and conditions it prescribes, the taking of any *candidate* species...." [emphasis added]

longer protected under CESA because it is not listed and is no longer a candidate for listing.

If the Commission decides that listing the longfin smelt "is warranted," the former candidate species then becomes a listed species and all the activities resulting in take of longfin smelt currently covered by the 2084 regulation will be required to obtain an Incidental Take Permit (ITP) pursuant to FGC section 2081 or otherwise obtain take coverage. ITPs are authorized for certain activities if specified criteria are met, including minimization and full mitigation of the impacts of the take. ITP's are issued on a project-by-project basis to ensure the mitigation and minimization measures are narrowly tailored to the individual project and protective of the species covered. The measures set forth in the 2084 regulation may or may not be appropriate for a specific ITP. As such, the provisions of the proposed regulation are not necessarily a precedent for any requirement of any future ITP.

If the Commission decides that listing the longfin smelt "is not warranted," take of the former candidate species would no longer be prohibited under CESA. Absent protected status, no mechanism, including a permanent regulation, would be needed to authorize take of longfin smelt.

In summary, the Commission has complied with this requirement by diligently pursuing its determination of whether or not listing of longfin smelt is warranted. The inherent temporary nature of a 2084 regulation makes pursuing its permanent status unnecessary and contrary to statute. The Commission's final decision regarding the status of the longfin smelt will either mandate that CESA listing protections prohibiting take unless otherwise authorized are afforded the species or not.